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United Nations Commission on International Trade Law

Thirty-fourth session

Summary record of the 719th meeting

Held at the Vienna International Centre, Vienna, on Friday, 29 June 2001, at 9.30 a.m.

Chairman: Mr. Pérez-Nieto Castro ..... (Mexico)

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Draft Convention on Assignment of Receivables in International Trade (*continued*)

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Any corrections to the records of the meetings of this session will be consolidated in a single corrigendum.

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The meeting was called to order at 9.50 a.m.

Draft Convention on Assignment of Receivables in International Trade (*continued*) (A/CN.9/486, A/CN.9/489 and Add.1, A/CN.9/490 and Add.1-5 and A/CN.9/491 and Add.1)

Article 5 (h) (continued)

1. **The Chairman** asked whether the delegations of the United Kingdom and Germany had resolved their differences with regard to the proposal made by the representative of Germany at the previous meeting.

2. **Mr. Franken** (Germany) said that their differences had not been resolved. The key problem was that, as a matter of public policy, the United Kingdom system required registration for the validation of all assignments, wherever they were located.

3. **Mr. Stoufflet** (France) said that the delegation of the United Kingdom seemed to be overestimating the scope of the German proposal. As he understood it, the proposal was simply to consider branches of banks as being autonomous for the purposes of resolving issues of priority. In other respects, they should not be considered as separate legal entities.

4. **Mr. Smith** (United States of America) asked for clarification of whether the proposal was to apply the branch location rule to banks only, or whether it would extend to other financial institutions such as insurance companies and investment banks. It was unclear whether the scope of the proposal was indeed as limited as the representative of France had suggested.

5. **Mr. Bazinas** (Secretariat) said that, as he understood it, France's interpretation of the proposal was more limited in scope than the original proposal for another reason. The representative of France had suggested that the branch location rule would apply only for the purposes of priority issues, in other words solely in relation to article 24. Had he intended to make that restriction, or did he mean that that would simply be the most significant effect?

6. **Mr. Chan** (Singapore) said that all of the issues currently being raised had already been dealt with before. Identical discussions had taken place two years earlier in a session of the Working Group. In view of the short time remaining, he doubted the usefulness of going back over old ground.

7. He also expressed serious doubts about the wisdom of the German proposal. Foreign banks in Singapore could choose whether to become wholly-owned subsidiaries, thereby constituting a separate corporate entity under the laws of Singapore, or to remain branches and retain the legal personality of the bank of their home country. His delegation would not support a proposal which treated branches separately from the main legal entity, whatever the purpose; for to do so would confuse the internal workings of the corporate entity in the eyes of the public, allowing it to shift assets, obligations or receivables between branches in order to avoid liabilities or enhance profitability, without any transparency and to the detriment of business partners and shareholders.

8. **The Chairman** said that under article 1, paragraph 3, of the UNCITRAL Model Law on International Credit Transfers, branches and separate offices of a bank in different States were regarded as separate banks for the purposes of determining the sphere of application of the Model Law.

9. **Mr. Deschamps** (Canada) said that lengthy discussions had taken place at previous sessions of the Commission in an attempt to find a solution to the problem of a bank's location. It had proved impossible to define a branch as being a separate entity without at the same time identifying the precise location of a receivable. Since the provisions concerning priority constituted one of the most important parts of the draft Convention, it was essential that only one law should apply in the event of a conflict between two assignees. If a loan granted by a bank was assigned, the assignee had to be able to ensure that he had priority, and must therefore be able to identify in which branch the loan was located. Many fruitless attempts had been made to find criteria with which to determine the branch in which a loan was located. Thus, for example, loans were often managed by a different branch from that in which they were registered—not necessarily one located in the same country. Furthermore, during the lifetime of the loan, its location might even be changed; a standard clause in some loan agreements required the bank to relocate the loan in a different country if its remaining in the original location would

result in higher costs for the borrower, for instance because of changes in tax regulations.

10. **Mr. Doyle** (Observer for Ireland) agreed with the representative of Singapore that article 5 (h) should not be up for discussion at all, since it had already been agreed on. The definition of location must therefore remain unchanged.

11. **Mr. Morán Bovio** (Spain) agreed with the delegations of Ireland, Singapore and Canada that unless some radical and innovative proposal were to be made, the debate should not be taken any further. The right to place loans with the branch of their choice was an internal matter for banks, and one with which the Commission was not in a position to interfere, except to specify that, once it had been established, the location of a loan should not be changed.

12. **Mr. Franken** (Germany) said that it was not true that banks were entirely free to decide whether branches should become independent legal entities. The rules of the banking supervisory authorities recognized that banks needed to increase their equity capital in order to support business activities. Consequently, many banks had switched operations in foreign countries from subsidiaries to dependent branches, so that they could rely on the equity capital of the parent company. In Canada, for instance, national regulations had formerly only allowed foreign banks to operate if they were separate entities, but had begun to permit branch activity in view of the increased need for equity capital. A similar situation was arising in Singapore for precisely the same reason. It had to be recognized that operations abroad would increasingly be based on the overall capital position of the parent company. Furthermore, the situation was not as simple as the representative of Spain had suggested: banks were not free to make accounting entries in whatever branch they pleased, for they were bound to comply with the banking supervisory regulations and tax regulations of the country in which the branch was located. Consequently, he urged the Commission to attempt to resolve the issues he had raised.

13. **Mr. Berner** (Observer for the Association of the Bar of the City of New York), endorsing the comments made by the representatives of Germany, France and China, said that it was commonly accepted by the financial markets that banks followed the rules of the country in which they conducted their business. Therefore a branch of a United States bank based in Germany had to follow German rules, and vice versa. Since third parties were involved, that was not simply an internal matter for banks.

14. **Mr. Al-Nasser** (Observer for Saudi Arabia) supported the comments made by the representatives of France and Germany and the Observer for the Association of the Bar of the City of New York. The representative of Germany was an expert in banking matters and was familiar with the workings of the supervisory authorities. Account should also be taken of the new rules established by the World Trade Organization governing the opening of branches.

15. **Mr. Markus** (Observer for Switzerland) supported the proposal made by the representative of Germany.

16. **Mr. Chan** (Singapore) said that while there were strong arguments on both sides, the location rule remained fundamental for the establishment of certainty. While it was true that, in order to remain competitive and in the context of market opening measures, banks were tending to operate through branches rather than subsidiaries, that was all the more reason to maintain the location rule as it stood in the text. Banks should not be allowed to have things both ways, by retaining branches for certain purposes but not for others.

17. **Mr. Ducaroir** (Observer for the European Banking Federation) said that he fully supported the German proposal and was not at all convinced by the arguments put forward by the representatives of the United Kingdom and Canada. As a practitioner, he found it difficult to understand that the draft Convention should establish a rule on location that did not apply to bank branches, whether acting as assignees or as assignors.

18. **Mr. Whiteley** (United Kingdom), summarizing his delegation's position, said that the key point was not where the branch was located but where the affairs of the bank would be wound up in the event of insolvency. In most cases, that would be the place of incorporation.

19. **Ms. Straganz** (Austria), **Mr. Medin** (Sweden) and **Ms. Gavrilescu** (Romania) expressed support for the proposal by the representative of Germany.

20. **Mr. Smith** (United States of America) asked whether he was correct in interpreting the proposal by

the representative of Germany as applying only to banks and their branches and not to other financial institutions, and as applying only to the definition of location, so that the question of whether a bank or the branch of a bank was located in a particular country was important not only for the issue of priority but also for the issue of nationality and the scope of the Convention as a whole. He also wished to know whether he was correct in assuming that the issue was relevant only when the bank was the assignor or the assignee, since a rule already existed in the case of debtors, as noted by the representative of the European Banking Federation.

21. **Mr. Franken** (Germany) said that all three assumptions regarding his proposal were correct.

22. **The Chairman** noted that a majority of members were in favour of the concept underlying the German proposal, which was consistent with the wording of article 1, paragraph 3, of the UNCITRAL Model Law on International Credit Transfers.

23. **Ms. Sabo** (Canada) said that such a radical change concerning a fundamental point could not be adopted until a text in writing was available for consideration.

24. **Mr. Chan** (Singapore) said that the term "bank" would take on a new meaning if the proposed amended version of article 5 (h) was adopted. He wondered whether it was used consistently in that sense throughout the Convention.

25. **Mr. Deschamps** (Canada) said that adoption of the proposed new wording would call for a review of the definition not only of a bank but also of a branch of a bank. It would also be necessary to develop criteria for establishing a link between a receivable and the branch in question.

26. **Mr. Adensamer** (Austria) said that his delegation's support for the proposed amendment had not been subject to the understanding that it was restricted to banks. It had been interpreted as applying to all debtors. The Commission should not establish special legislation for banks and there was no need to redefine either a bank or a branch.

27. **Mr. Al-Nasser** (Observer for Saudi Arabia) proposed using the definition of a bank and a branch contained in the UNCITRAL Model Law on International Credit Transfers.

28. **Mr. Sekolec** (Secretary of the Commission) said that in the context of the Model Law the term "bank" meant different things in different countries. In an attempt to clarify matters, article 1, paragraph 2, of the Model Law stated that the law also applied to other entities "that as an ordinary part of their business" engaged in executing payment orders.

29. **The Chairman** said that the debate on article 5 (h) would not be closed until the proposed amendment had been circulated in writing. He took it, however, that a majority in the Commission supported the underlying concept.

Article 5 (g)

30. **Mr. Smith** (United States of America) said that the version of article 5 (g) contained in document A/CN.9/XXXIV/CRP.2 addressed priority only with respect to a competing claimant. But a competing claimant was narrowly defined and would not include a competitor who was not a competing claimant within the meaning of the definition of priority. By virtue of the operation of new paragraph 3 of article 26 (A/CN.9/XXXIV/CRP.2/Add.1), parties who were not competing claimants but who were entitled to priority could enjoy protection. The definition of priority should therefore be extended to include other persons. His proposal was to add the words "or other person" after the words "the right of a competing claimant", in article 5 (g).

31. **Mr. Kobori** (Japan) said he had some difficulty in understanding the phrase "to the extent relevant for such purpose" since no purpose had previously been specified. He also failed to see how a right could "include the determination". He therefore suggested an amendment along the following lines: "to the extent relevant for the purpose of the determination of such preference". He further suggested that the opening phrase should be amended to read: "'Priority' means preference of the right of a person over the right of a competing claimant".

32. **Mr. Zanker** (Observer for Australia) said he would welcome some clarification of the point regarding competing claimants made by the representative of the United States. By definition, where different claims existed for a particular sum of money, the priority rule determined which claim prevailed, but those involved were necessarily both competitors and claimants.

33. **Mr. Smith** (United States of America) said that article 26, new paragraph 3, preserved certain priority rights for particular parties. One such party could be a transferee for value of a deposit or securities account or of funds in the account. But the definition of a competing claimant would not necessarily cover all the parties protected under new paragraph 3. As the definition of priority referred only to "the right of a person in preference to the right of a competing claimant", it would not include other protected parties that fell outside the scope of the definition of a competing claimant. His proposed amendment would give full effect to the Commission's policy decision without altering the substance of the meaning of priority elsewhere.

34. **Ms. Walsh** (Canada) requested time to consider the implications of the amendment proposed by the United States.

35. During the discussion of article 24, the Secretariat had stated that the question of whether the definition of priority should include a reference to any steps that had to be taken to render an assignee's right effective against third parties would be taken up in connection with draft article 8. Any decision on the wording of article 5 (g) should therefore be made subject to the outcome of the subsequent discussion of article 8.

36. **Mr. Bazinas** (Secretariat) confirmed that it was the Secretariat's understanding that the point would be taken up in connection with article 8. The definition of a competing claimant in article 5 (m) did not include a securities intermediary who had a right in the receivable as original collateral. Article 26 covered a conflict between, for example, an assignee with an interest in a securities account as proceeds and a securities intermediary with an interest in the securities account as original collateral, who was not a competing claimant within the meaning of article 5 (m). That, as he saw it, was the reason for the proposal to insert the words "or other person" in article 5 (g). It would not change the substance of the definition of priority, but would bring it into line with article 26.

37. **Mr. Deschamps** (Canada) asked whether the United States proposal implied that article 26, paragraph 3, protected persons who did not come within the scope of paragraph 2. With regard to the example cited by the Secretariat, he submitted that a securities intermediary would be a competing claimant by virtue of asserting a claim to a right in the proceeds; the securities intermediary would be a creditor of the assignor. Article 26, paragraph 2, referred to proceeds received by the assignor and the purpose of paragraph 3 was to protect persons dealing with the assignor. He was not necessarily opposed to the proposed amendment in principle but he wished to be sure of its implications. It might be wise to take another look at other provisions of the Convention that referred to "priority" or "competing claimant" and that might inadvertently be affected by the amendment.

38. **The Chairman** asked the representative of Canada whether he considered that the matter could be referred to the drafting group on the understanding that the Commission supported the principle underlying the proposed amendment.

39. **Mr. Deschamps** (Canada) said that his delegation would need time to ascertain whether it was merely a drafting matter or whether it raised points of substance affecting other provisions of the Convention.

40. **Mr. Doyle** (Observer for Ireland) said that while his delegation had no objection in principle to the United States proposal, the suggested definition was so broad as to be of little practical use. If the concern related to the persons referred to in article 26, new paragraph 3, it might be sufficient simply to refer directly to those persons.

41. **Mr. Smith** (United States of America) said that no substantive change was proposed, nor was there any intention to open up the definition of priority. It was simply that elsewhere in the Convention—for example, in article 24, paragraph 1 (a)—the term "priority" was used in reference to a competing claimant. If it was felt that a substantive change was involved, his delegation would be happy to consider some other form of words. Otherwise, the matter could be left to the drafting group.

42. **Mr. Zanker** (Observer for Australia) said that, on reconsidering the original wording of article 5 (g), the drafting group had produced the text contained in document A/CN.9/XXXIV/CRP.2. Perhaps it would have sufficed if the group had merely added to the original text contained in document A/CN.9/489 the phrase "to the extent relevant for such purpose". While recognizing that the Canadian delegation had reservations as to whether the proposal involved a substantive change, which would have a consequential

effect on other provisions, his delegation was prepared to proceed on the basis that the United States delegation was correct in saying that no substantive change was involved.

43. **The Chairman** said he took it that the Commission wished to adopt the United States proposal, subject to scrutiny by the drafting group and a decision as to whether it would have an impact on other articles.

44. *It was so decided.*

Article 5 (k)

45. **Mr. Ducaroir** (Observer for the European Banking Federation) said that the text of article 5 (k) was largely satisfactory, but contained the potential for divergences of interpretation, which could result in conflicts before the courts, regarding the respective risks borne by the counter-parties to a transaction. To reduce that risk, financial contracts were, in practice, often accompanied by a collateral or credit support arrangement, which formed an integral part of the contract. In order to avoid any ambiguity concerning such arrangements, the words "mentioned above" should be followed by the words "and any and all collateral and credit support related to any transaction mentioned above". That form of words was the one suggested by the Financial Markets Lawyers Group in document A/CN.9/490/Add.4.

46. **The Chairman** recalled that a similar proposal had been discussed and rejected at the thirty-third session.

47. **Mr. Smith** (United States of America) said that, if a derivatives contract obligation was secured by a receivable to which the Convention would normally apply, all the rules under the Convention as currently drafted would apply to that receivable. That outcome seemed correct to his delegation. However, under the European Banking Federation's proposal, a receivable that happened to secure a financial contract would not be governed by the Convention. That could give rise to numerous problems, subjecting assignments to different regimes depending on the nature of the obligation secured by the receivable. He saw no reason for the Commission to change its view simply to accommodate receivables that happened to secure a financial contract.

48. **Mr. Whiteley** (United Kingdom) said that, while his delegation would be happy to retain the current text, it was true that anomalies existed. Collateral arrangements with regard to derivatives transactions might be complex but were an important part of the way the derivatives market functioned. A derivatives transaction differed from a secured loan in that the potential exposure of the counter-parties could change over time. For example, a party borrowing and repaying US$ 100 created an exposure of US$ 100 to the lender; if, however, he repaid €85, and the parties pledged that they would reverse the exchange in three years' time, the value of the contract would change depending on whether the euro depreciated or rose against the dollar. When a party took collateral for a derivatives contract, therefore, there must be a promise to provide collateral not just at the beginning of the contract but throughout the life of the transaction. As exposure changed, the parties adjusted the amount of collateral held, so that neither held too much collateral or had too much exposure. The current practice was either to use a security interest or to make an arrangement often called a "title transfer", involving the sale and buyback of the relevant assets. The party who had exposure had the right to demand the delivery and the absolute ownership of fungible financial assets in exchange for a promise to give back an equivalent asset either when the exposure dropped or if the counter-party defaulted. The current wording of the provision would cover collateral arrangements structured as a title transfer, because it would constitute the spot transfer of a security and a forward on the security, both of which would be part of the netting agreement; but it would not cover arrangements structured as a security interest, even though the economic effect was largely the same, the main difference being that the party receiving collateral under a security interest could not use that collateral as though it were his own assets (unless the relevant agreement was a New York law security interest). To create a distinction between the two arrangements unnecessarily distorted the financial markets, and it might be appropriate for the Commission to adjust the wording so as to enable current practice to continue.

49. **The Chairman** said that the Commission did not have time to reconsider a proposal that had already been rejected. Unless there was strong support for the proposal, the original draft should remain unchanged.

50. **Mr. Deschamps** (Canada) said that, for the reasons given by the representative of the United States and for other reasons that he could cite if necessary, his delegation was opposed to the amendment proposed by the Observer for the European Banking Federation.

51. **The Chairman** said that the text of article 5 (k) would remain unchanged.

The meeting was suspended at 11.15 a.m. and resumed at 11.50 a.m.

Article 5 (l)

52. **Mr. Ducaroir** (Observer for the European Banking Federation) proposed that the first sentence should be amended to read: " 'Netting agreement' means an agreement between two or more parties that provides for one or more of the following:". The reason was that netting agreements were sometimes multilateral, involving several parties. The suggested addition would serve to dispel any ambiguity.

53. *The proposal was approved*

54. **Mr. Kobori** (Japan) suggested that, when discussing draft article 9, the Commission should consider including a definition of the term "undivided interests" in draft article 5 (h).

Article 5 (h) (continued)

55. **Mr. Franken** (Germany), reverting to article 5 (h), proposed the following addition, to follow the third sentence: "If the assignor or the assignee is engaged in the business of banking by making loans and accepting deposits, a branch of that assignee or assignor is a separate person".

56. **Mr. Brito da Silva Correia** (Observer for Portugal) said that the formulation proposed by the representative of Germany should be amended to include the words "if the assignor has a place of business in more than one State or has a branch in another State, the place of business is that of the branch".

57. **Mr. Whiteley** (United Kingdom) said that his delegation shared the concerns of the observer for Portugal. The German proposal should specify that the branch of the assignor or assignee was deemed to be a separate person only for the purposes of that definition. The proposal should refer not only to the business in which the relevant person was engaged, since some persons might not be legitimately engaged in such business, but also to authorization.

58. **Mr. Salinger** (Observer for Factors Chain International) wished to know why it was necessary to refer to the location of the assignee, since the main purpose of the German proposal was to deal with priorities that required specification of the assignor's location. The inclusion in the proposal of a reference to the assignee would have peculiar results in the factoring business, since some factoring companies, particularly in Germany, were constituted as banks, while others were not.

59. **Mr. Franken** (Germany) said that, since some delegations had expressed concern about the creation of a new legal term under the Convention, the second part of the proposal could read "... is deemed a separate person for the purpose of this definition". With regard to the issue raised by Factors Chain International, his delegation could accept the deletion of the words "or the assignee" from its proposal.

60. **Ms. McMillan** (United Kingdom) proposed that the words "If the assignor or the assignee is engaged in the business of banking ..." should be amended to read "If the assignor is authorized to engage in the business of banking ...". If the proposed text did not contain the idea of authorization, the Convention could be interpreted as including the activities of unauthorized entities, such as loan sharks.

61. **Mr. Franken** (Germany) said that his delegation accepted the United Kingdom's proposal.

62. **Mr. Deschamps** (Canada) inquired whether Germany's proposal implied that any branch within the same State was a separate legal entity. He also pointed out that in Canada foreign banks were allowed to carry on business through branches and that, like many other countries, Canada made a distinction between full-service branches and lending branches, which were not allowed to accept deposits. A number of foreign banks in Canada had decided to operate through lending branches, since the regulations governing such branches were less stringent. The proposal by Germany would cover only full-service branches.

63. **Mr. Franken** (Germany), replying to the first question raised by the representative of Canada, said that the proposal referred to entities active in more than one State. In order to allay the concerns of some

delegations, the second part of the proposal could be amended to read "... a branch of that assignor in another State is deemed a separate person for the purpose of this definition".

64. With regard to Canada's concern about bank branches that engaged only in lending activities, he said that the United Kingdom's proposal to include a reference to the authorization of a person to engage in banking in the broadest sense would resolve Canada's concerns. The proposal would thus read: "If the assignor is authorized to be engaged in the business of banking, a branch of that assignor in another State is deemed a separate person for the purpose of this definition."

65. **Mr. Morán Bovio** (Spain) inquired whether the German proposal would make it easier for the assignee to determine which law was applicable to it, since that would save the assignee time and money. He also wished to know how a simple agency in another country could be distinguished from an entity that was fully operational and registered in that country. He would welcome an explanation of the economic impact of the German proposal.

66. **Mr. Franken** (Germany), replying to the questions raised by the representative of Spain, said that the proposal would indeed make life easier for the assignee. In a transaction, it was usually necessary to check the law of the assignor and possibly the law of the assignee, as well as the law to be applied at the place of business. The proposed amendment provided that the assignee would need to know only the law of the place of business.

67. **Mr. Huang Feng** (China) proposed that the words "for the purpose of this Convention" should be included in the German proposal. Reference to the assignee should be retained, since banks very often bought receivables and acted as assignees.

68. **The Chairman** pointed out that draft article 5 began with the words "For the purposes of this Convention", and wondered whether the representative of China would consider that reference to be sufficient. Delegations should indicate whether or not they supported China's proposal to retain the reference to the assignee in the German proposal; if they did not wish to do so, the proposal would remain as it stood.

69. **Mr. Kobori** (Japan) said that his delegation supported China's proposal to retain the reference to the assignee in the German proposal.

70. **Mr. Brink** (Observer for the European Federation of Factoring Associations—Europafactoring) inquired whether receivables from the entities referred to in the proposed definition also had to relate to the relevant business, or if all receivables of such entities were affected by that rule, since a bank might have receivables from loans or credits or from other types of business. That might result in the conduct of an international transaction in a case where a bank changed administration of an account from the central office to a branch, or vice versa. If a branch was deemed to be a separate entity and it was assumed that the branch was located in another State, that might trigger the application of the Convention with respect to the transaction, which was in fact not a transaction at all but merely an administrative change within the bank. Furthermore, once the Convention had been applied, it would continue to govern any further assignment in accordance with the rules governing subsequent assignments. He wondered whether that effect was intentional.

71. **Mr. Smith** (United States of America) said that, in order for the branch bank rule to apply, it was necessary to determine in what activity the assignor was engaged. If the assignor was authorized to engage in the business of banking but did not actually engage in that business, the assignor would be treated like any other assignor and would not be subject to the branch bank rule. It was unclear whether the authority to conduct business referred to the authority of the head office or to the authority of the branch in the country in which the branch engaged in the banking business. His delegation was strongly in favour of retaining the original language of the German proposal, which referred to the assignor as being in the business of banking and also indicated that banking meant making loans and accepting deposits.

72. **Mr. Zanker** (Observer for Australia) said that perhaps article 5 (h) should be left as it stood. The introduction of new rules about banks having branches that were separate legal entities was unnecessary, since a prudent bank or other entity would specify the law applicable to contracts relating to assignments. It seemed as if the issue was being made far more complicated than it needed to be.

73. **The Chairman** urged delegations to attempt to resolve their differences regarding article 5 (h) in informal consultations with the delegation of Germany before the 720th meeting.

The meeting rose at 12.30 p.m.

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United Nations Commission on International Trade Law
Thirty-fourth session

Summary record of the 720th meeting
Held at the Vienna International Centre, Vienna, on Friday, 29 June 2001, at 2 p.m.

Chairman: Mr. Pérez-Nieto Castro .....(Mexico)

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Election of officers (*continued*)

Draft Convention on Assignment of Receivables in International Trade (*continued*)

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The meeting was called to order at 2.10 p.m.

Election of officers (*continued*)

1. **Ms. Ladová** (Observer for the Czech Republic), speaking on behalf of the Group of Eastern European States, nominated Ms. Gavrilescu (Romania) for one of the posts of Vice-Chairman.

2. *Ms. Gavrilescu (Romania) was elected Vice-Chairman by acclamation.*

3. **Mr. Ishii** (Japan), speaking on behalf of the Asian Group, nominated Ms. Zhou Xiaoyan (China) for one of the posts of Vice-Chairman.

4. **Mr. Meena** (India) seconded the nomination.

5. *Ms. Zhou Xiaoyan (China) was elected Vice-Chairman by acclamation.*

Draft Convention on Assignment of Receivables in International Trade (*continued*) (A/CN.9/486, A/CN.9/489 and Add.1, A/CN.9/490 and Add.1-5 and A/CN.9/491 and Add.1)

Article 5 (h) (*continued*)

6. In response to a question from **the Chairman**, **Mr. Franken** (Germany) said that the observer for Factors Chain International had withdrawn his objection to the German proposal. In accordance with the wishes of the representative of China and others, the reference to the assignee was to be retained in the proposal.

7. **Mr. Deschamps** (Canada) said that his delegation was in favour of retaining the current definition of location. The German proposal would entail a fundamental change. Its purpose was to ensure that the assignor or the assignee would be located at the branch with the closest connection with the assignment, but he did not believe that that result could be achieved by deeming branches to be separate legal persons.

8. A branch in one country that lent money to a customer and took an assignment of receivables from him as security, would, if the German proposal were adopted, be a separate legal entity. If the bank then lent money to the same customer through a branch in another country, would the proposal mean that the loans made by the second branch would not be secured by the assignment? A borrower that was a multinational corporation frequently had places of business in many countries and borrowed from a branch of the bank in each country. If such a borrower granted an assignment of its receivables as security to a bank with branches in three different countries, would they be three different entities, and the assignment of receivables be deemed to be an assignment with three different assignees? Those were just a few illustrations of the many difficulties created by the proposal.

9. **Mr. Doyle** (Observer for Ireland) said it had been his understanding that at its previous meeting the Commission had approved the German proposal in substance. He failed to understand why some delegations were debating its merits again, and he urged the Commission to close the debate.

10. **The Chairman** said that the Commission had indeed initially approved the concept of the German proposal but that once it had been formally tabled, questions had been raised on the substance because of the divergences between that proposal and the text of the Convention. He recalled that the German proposal had already been tabled and discussed twice before at previous sessions and had each time been rejected. It had now been resubmitted, and divergent opinions had again been expressed on important points. After five years, time had now run out for discussion, and he would therefore ask the German delegation to withdraw its proposal.

11. **Mr. Franken** (Germany) said that all who were familiar with the banking business saw a need for his delegation's proposal; indeed, the European Central Bank had urged the German Government to raise the matter again. However, if there was no agreement in the Commission, his delegation was prepared to withdraw the proposal.

12. **Ms. Brelier** (France) said she wished it to be recorded that the withdrawal of the German proposal would present France with a serious problem when it came to ratification of the Convention.

13. **Mr. Huang Feng** (China) expressed his delegation's regret that the German proposal had been withdrawn.

14. *Draft article 5 (h) was approved.*

Article 6

15. *Draft article 6 was approved.*

Article 7

16. *Draft article 7 was approved.*

Article 8

17. **Mr. Kobori** (Japan) said that the wording of draft article 8 was somewhat unclear. He therefore proposed the deletion of the words "if any form requirements exist", which were ambiguous.

18. **The Chairman** said that article 8 was a rule of conflict and determined the validity of the form of the assignment with respect to the law of the State in which the assignor was located. If that law established any form requirements, they had to be met for the assignment to be valid. However, the law of the State in which the assignor was located might in turn determine the application of some other law which might well be a different one by virtue of the rules of private international law.

19. **Ms. Walsh** (Canada) said her delegation considered that the language of article 8 was too broad. In its analytical commentary on article 8 in document A/CN.9/489 the Secretariat had speculated that "form" in the context might mean, inter alia, notification of the debtor and registration in a public registry of notice of the assignment. Her delegation believed it was the Commission's policy that when such form requirements existed, they related to the area of priority and would be covered by the choice-of-law rule in articles 24 and 31. Uncertainty would ensue if such matters were instead covered by article 8, with the result that the law governing those issues could be either the law of the assignor State or any other law that might be applicable by virtue of the rules of private international law. In its comments contained in document A/CN.9/490/Add.5 her delegation had therefore suggested that article 8 should be reworded to make it clear that "form" in that article referred only to the form of a contract of assignment and only to issues between the assignor and assignee and would not affect third parties. Any effects of the assignment against third parties were properly dealt with under articles 24 and 31, and it might therefore be preferable to delete draft article 8.

20. She asked the Secretariat to amplify the proposal in its note on article 24 (A/CN.9/491, para. 18) that the definition of "priority" be expanded to include any requirements necessary to make an assignment effective as against third parties.

21. **Mr. Bazinas** (Secretariat) recalled that the Commission had kept pending the issue of an additional provision on form for chapter V until it had considered article 8. The Secretariat had proposals both for article 8 and for the new provision in chapter V.

22. As the representative of Canada had pointed out, there seemed to be an inconsistency between article 8 and article 24 since they both covered the form of assignment, but referred it to different laws. Article 8 provided for referral to the assignor's law or to other laws by virtue of the applicable rules of private international law. Article 24 referred priority to the law of the assignor's location. Priority normally included the steps to obtain priority which, as was clear from the draft Hague Conference text on the law applicable to securities held with an intermediary, should be referred to the same law. To address that problem the Secretariat had suggested, in paragraph 34 of document A/CN.9/491, wording to the effect that no form was necessary as between the assignor and the assignee and as against the debtor. The Working Group had agreed that the requirement as to form was not an issue in the relationship between the assignor and the assignee and not an issue as against the debtor, who was sufficiently protected by the requirement for a written notification. The real need for notification was to protect third parties. The Secretariat also suggested that, in the definition of priority, wording should be included to the effect that the steps to be taken for obtaining priority should be left to the law of the assignor's location.

23. As to the proposed new provision on form in chapter V, paragraph 21 of document A/CN.9/491 contained a proposal to adopt language along the lines of article 11 of the Convention on the Law Applicable to the International Sale of Goods, which dealt with the form of the contract of assignment.

24. **Mr. Morán Bovio** (Spain) thanked the Secretariat for its proposals, both of which would improve the text of the Convention and should be referred to the drafting group.

25. **Mr. Cohen** (United States of America) said that the useful analyses provided by the delegation of Canada and the Secretariat had convinced his delegation that article 8 as it stood was inadequate for

its purposes. The Secretariat's proposal in paragraph 34 of document A/CN.9/491 for a form-free assignment would have the effect of validating some assignments that might not be valid under the domestic law that would otherwise be applicable. He therefore endorsed the proposal of the representative of Canada to delete article 8.

26. **Mr. Stoufflet** (France) said that his delegation did not feel that article 8 was essential. It could not, however, accept the Secretariat's proposal for a form-free assignment since some provisions of France's internal legislation on the form of the assignment were stricter than the one proposed and a conflict of requirements would result.

27. **The Chairman** said that the Secretariat had informed him that it agreed with the proposal by the representative of Canada and was withdrawing its support for a revised article 8.

28. *Draft article 8 was deleted.*

Article 5 (g) (continued)

29. **The Chairman** recalled that the Secretariat's suggestion to amend the definition of priority in article 5 (g) by the addition of the words "and any steps necessary to render a right effective against a competing claimant" was still pending. He asked for the views of delegations on that proposal.

30. **Ms. McMillan** (United Kingdom) wondered whether it was proposed that the definition of priority in article 5 (g) should include compliance with the requirements as to form.

31. **Mr. Bazinas** (Secretariat) drew attention to paragraph 18 of document A/CN.9/491, which contained the suggestion by the Secretariat for a definition of priority. In the discussion of that definition the Secretariat had indicated that it would withhold the last few words of its proposal, namely, "and any steps necessary to render a right effective against a competing claimant", until the Commission had had an opportunity to consider the issue of form in article 8. The suggestion was therefore now before the Commission for consideration.

32. **Ms. Walsh** (Canada) and **Mr. Stoufflet** (France) said they were in favour of the addition of the proposed wording.

33. *Draft article 5 (g), as amended, was approved.*

34. *Draft article 5 as a whole, as amended, was approved.*

Form (new provision in chapter V)

35. **The Chairman** drew attention to the Secretariat's proposal in paragraph 21 of document A/CN.9/491 for a new provision in chapter V. That proposal was now before the Commission.

36. **Mr. Morán Bovio** (Spain) supported the inclusion of the proposed provision, which would clarify the text on points that would be important for States in ratifying the Convention.

37. *The text of the new provision on form in chapter V was approved.*

Article 9

38. **Mr. Ikeda** (Japan) sought clarification concerning the concept of undivided interests, which existed in Anglo-Saxon law, but did not figure in Japanese civil or commercial law. Article 9, paragraph 1, of the Convention merely stated that an assignment of one or more existing or future receivables and parts of or undivided interests in receivables was effective, without specifying in what way it was effective, and paragraph 89 of document A/CN.9/489 cast no further light on the matter. Could the assignee of the undivided interest demand payment directly from the debtor? If the answer was in the affirmative, how much could the assignee claim? Was it the total amount of the original receivable, or just the percentage that the assignee had contracted with the assignor? If two assignees had undivided interests in the same receivable, would not a problem of competing claims arise? There should be some clarification as to the handling of such matters in the initial contract.

39. **Mr. Stoufflet** (France) said that the concept of undivided interests existed in French civil law, and that when applied to goods that were by definition divisible, such as money, the assignment of an undivided interest would not raise any special problems, and would be governed by the provisions already approved by the Commission. In the case of a notification of a partial assignment, the debtor would be able to choose between making full payment to the assignor, thus acting as if it had not received notification of the partial assignment, or paying the assignor only the

portion which had not been assigned, and paying the assignee the part which had been assigned.

40. **Mr. Bazinas** (Secretariat) suggested it might be helpful if the delegation of Japan could identify the specific problems to which it believed article 9 could give rise and suggest possible solutions.

41. **Mr. Suk Kwang-hyun** (Observer for the Republic of Korea) said it had initially been his understanding, on the basis of his previous experience of common-law countries, that in the case of an assignment of a contractual right to payment the assignee would have a direct claim or right against the debtor, whereas in the case of an assignment of undivided interests, the assignee might not have that right. The assignment of undivided interests in payment might thus be similar to the assignment of a beneficial interest, whereby the right as such was not transferred or assigned to the assignee. If that was the case, then the first question raised by the representative of Japan must be answered. The issue was related to article 12, which addressed the transfer of security rights. According to the current draft, a property right securing payment of the assigned receivable would be transferred by virtue of the assignment. It would be advisable to make a distinction between the assignment of a contractual right and the assignment of an undivided interest in payment. In the case of an assignment of a contractual right, the current provision would be correct. However, in the case of an assignment of undivided interests in receivables, the undivided interest in the security, rather than the security itself, should be transferred.

The meeting was suspended at 3.20 p.m. and resumed at 3.45 p.m.

42. **Mr. Ikeda** (Japan) said that the concept of undivided interest was very special, and did not correspond to the French notion of "*droits indivis*". He requested clarification of the effectiveness of an undivided interest, in terms of its results in the field of financial operations.

43. **Mr. Whiteley** (United Kingdom) said that if two people married and decided to buy a house, they would normally do so using an undivided interest. They would probably borrow money, and would hold the house jointly, subject to the interest of the lending bank. If the lending bank had to foreclose, it would be taking an asset away from both, but it would be enforcing against only a single asset. If the two subsequently divorced and separated their interests in the property, the house would then be held in parts. If the bank were to foreclose, it would have to enforce against each part separately. The language of draft article 9 was simply intended to convey the idea that in some situations two people could hold property as if it were a single asset and they were one person, and that in other situations they could hold property and their respective interests in that property could be clearly demarcated.

44. **Mr. Ikeda** (Japan) proposed that a definition of "undivided interest" should be added to article 5. If there was no support for his proposal, he would withdraw it.

45. **The Chairman** noted that there appeared to be no support for the proposal.

46. **Mr. Bazinas** (Secretariat) said that paragraph 35 of document A/CN.9/491 contained a suggestion by the Secretariat for a reformulation of article 9, paragraph 1, intended to ensure that the provision did not inadvertently result in the validation of an assignment of future receivables—including consumer receivables, pensions and wages—prohibited by law.

47. **Mr. Cohen** (United States of America) supported the reformulation suggested by the Secretariat. However, he felt that the new wording should retain the concepts of "future receivables and parts of or undivided interests" and "one or more", which had apparently been inadvertently omitted from the Secretariat's proposal.

48. **Mr. Bazinas** (Secretariat) said it was his understanding that the proposal was to retain the original wording, replacing the words "is effective" with "is not ineffective ... on the sole ground that".

49. **Mr. Cohen** (United States of America) said that his delegation was in complete agreement with that formulation, with the exception of the use of the word "sole", which was no longer appropriate, as three different grounds would be described.

50. **The Chairman**, noting that the Commission agreed on the principle of the drafting change suggested by the Secretariat as orally revised by the representative of the United States, said he took it that the Commission wished to refer article 9 to the drafting group.

51. *On that understanding, draft article 9 was approved.*

Article 10

52. **Mr. Bazinas** (Secretariat) said that for the reasons set out in paragraph 36 of document A/CN.9/491, the Secretariat suggested the deletion of the article.

53. **Mr. Deschamps** (Canada) said that he concurred with the suggestion of the Secretariat.

54. *Draft article 10 was deleted.*

Article 11

55. **Mr. Bazinas** (Secretariat) said that paragraph 37 of document A/CN.9/491 contained a suggestion to recast article 11, paragraph 3, to reflect more accurately the intentions of the Commission. The Secretariat presented three options. The first would involve a statement to the effect that the article did not apply to the assignment of financial service receivables. While that term might be somewhat ambiguous, it already figured in article 11, paragraph 3 (a). Furthermore, it might be difficult to come up with a uniform definition.

56. A second possibility would be to identify the types of financial service contracts that must be excluded from the scope of article 11. Two such types of contracts were loan agreements and insurance policies.

57. The third option would be to limit the scope of article 11 to the assignment of future receivables or receivables that could not be individually identified, without recourse to a list. Article 11 would thus not apply to the assignment of a single, existing receivable. The reasoning behind that proposal was that it was easier for the assignee to know whether there was an anti-assignment clause where there was a single contract. Where there was a multiplicity of contracts, it was difficult or impossible for the assignee to check all of them to determine whether there was an anti-assignment clause.

58. **Mr. Whiteley** (United Kingdom) pointed out that article 11, paragraph 1, in its current formulation would apply to credit card transactions. By excluding financial service contracts, the Convention might also exclude such transactions, as they involved an extension of credit and might be categorized as financial service contracts.

59. The exclusion of financial service contracts or the reference to a single, existing receivable would not cover the situation of swaps and annuities. Swaps were not financial service contracts, as the parties entered into them together as principal, each making payments and managing the risk independently of the payments it received. As for annuities, the Commission must consider whether annuity payments were to be considered as a single receivable or as multiple receivables. If one of the texts suggested by the Secretariat were approved, there should be a reference not only to financial service contracts, but also to financial contracts generally.

60. **The Chairman** noted that there appeared to be no support for any of the Secretariat's suggestions for amendment.

61. **Ms. Brelier** (France) requested clarification about the use of the bracketed word "goods" in article 11, paragraph 3 (a).

62. **Mr. Bazinas** (Secretariat) said that the wording in question was the subject of paragraph 30 of document A/CN.9/491. The term "goods" had been placed in square brackets because the French text, "*biens meubles corporels*", raised the question whether general intangible property (i.e. intellectual or industrial property or other information) was included. Since intangibles were apparently covered in subparagraph (b), the Commission might wish to remove the square brackets from subparagraph (a) and explain the matter further in the commentary. The same issue arose in article 12, paragraph 4 (a).

63. **Ms. Brelier** (France) drew attention to her Government's comments on article 11, paragraph 3 (a), in document A/CN.9/490/Add.1 For the reasons set forth in that document, the word "goods", in subparagraph (a), should be understood as covering both tangible and intangible movable property. The list in subparagraph (b) was not sufficient. The words "or other information", at the end of subparagraph (b), should be replaced by "or other intangible property (*ou d'autres biens incorporels*)".

64. **Mr. Whiteley** (United Kingdom) said that his delegation intended to propose some changes to article 4, paragraph 3, relating to the exclusion of land, and that if its proposal was accepted then the reference to "real estate" in article 11, paragraph 3 (a), should also be changed to "land".

65. Concerning the types of asset covered, a reference to "any other intangible property" might include financial contracts. Was it the Commission's intention to establish such a wide scope for article 11, paragraph 1? His delegation had certain reservations even with regard to the use of the word "goods": some financial contracts might involve the supply of commodities such as grain or oil. Bullion, too, could be considered as goods. While sympathizing with those delegations that considered the wording to be imprecise, he felt that it should not be reformulated.

66. **Mr. Sigman** (United States of America) said that while his delegation had no objection to the inclusion of certain intangibles such as goodwill, and would support the inclusion of a carefully circumscribed description of intangibles, it shared the concern of the representative of the United Kingdom that financial services might be considered as intangible property. The French proposal was too broad. Perhaps it could be left to the drafting group to find an acceptable wording.

67. **The Chairman** noted that the Commission accepted in principle the idea that intangible assets should be included, and that the exact wording should be referred to the drafting group. He took it that the Commission also wished to remove the brackets from around the word "goods".

68. *On that understanding, draft article 11 was approved.*

Article 12

69. **Mr. Bazinas** (Secretariat) said that, as in the case of article 11, the brackets around the word "goods" in article 12, paragraph 4 (a), should be removed.

70. **Ms. Brelier** (France), supported by **Mr. Al-Nasser** (Observer for Saudi Arabia), said that, as in the case of article 11, the words "or other information", in paragraph 4 (b), should be replaced by a reference to other intangible assets.

71. **Mr. Kobori** (Japan) said that Japanese internal law provided for special types of mortgages that were not transferable. The words "if such right is transferable under the law governing it" should therefore be added at the end of the first sentence of paragraph 1, to cover such cases.

72. **Mr. Bazinas** (Secretariat) said that if there was a statutory limitation on assignment under Japanese law, perhaps it would be preserved under the terms of article 9, paragraph 3.

73. **Mr. Kobori** (Japan) said that his delegation's concern related, not to the limitation of assignment, but to the transferability of the special type of mortgage. That question was not addressed by article 9, paragraph 3.

74. **The Chairman** noted that there was no support for the Japanese proposal.

75. *Draft article 12 was approved.*

Article 13

76. *Draft article 13 was approved.*

Article 14

77. *Draft article 14 was approved.*

Article 15

78. *Draft article 15 was approved.*

Article 16

79. *Draft article 16 was approved.*

Article 17

80. **Ms. Brelier** (France) introduced a proposal to add a third paragraph to draft article 17. The proposal superseded an earlier proposal circulated in writing, and would read: "This Convention does not authorize a debtor who is a consumer to enter into or modify an original contract in violation of the law of the location of the consumer".

81. **Mr. Winship** (United States of America) said that his delegation supported the proposal put forward by the delegation of France. Perhaps it would be advisable, for purposes of clarification, to insert a cross-reference to article 17 in article 6, which addressed party autonomy.

82. **Mr. Franken** (Germany) and **Mr. Markus** (Observer for Switzerland) endorsed the proposals made by the representatives of France and the United States.

83. **Mr. Chan** (Singapore) questioned whether it was appropriate to place the proposed text, which imposed a restriction on the debtor, in article 17, which covered the principle of debtor protection. The policy underlying the proposed amendment related rather to the preservation of the regulatory laws of the State.

84. **Mr. Bazinas** (Secretariat) said that, as he understood it, the intention was to ensure that if a debtor was not authorized by national consumer protection law to waive rights, then the Convention would not authorize it to do so. As that would seem to be a debtor protection issue, it would have its place in article 17.

85. **Mr. Chan** (Singapore) reiterated that the text as formulated constituted a restriction on, rather than protection of, the debtor. Perhaps the drafting group could find wording that would confine its effect.

86. **Ms. Mangklatanakul** (Thailand) said that the proposal put forward orally by France was somewhat difficult to follow. Perhaps it would be preferable to state in the chapeau of the article that the Convention was not intended to override national consumer protection legislation.

87. **Mr. Kobori** (Japan) said that reference to the habitual residence of the consumer, as in article 5 (h), would be more appropriate than reference to the law of the location of the consumer.

88. **Mr. Doyle** (Observer for Ireland) supported the view expressed by the representative of Singapore. The text proposed was not a principle of debtor protection.

89. **Mr. Bazinas** (Secretariat) said that the Commission might wish to decide whether to refer directly to the habitual residence of the consumer, or to rely on the secondary rule in article 5 (h).

90. **Mr. Deschamps** (Canada) noted that in paragraph 40 of document A/CN.9/491 the Secretariat had suggested the possibility of doing away with references to consumer protection in articles 21 and 23, by including in the Convention a general article worded along the following lines: "This Convention does not override law governing the protection of parties in transactions made for personal, family or household purposes". The adoption of such an approach would also obviate the need for such a reference in article 17. A similar approach was proposed by the Government of Canada in document A/CN.9/490/Add.5.

91. **The Chairman** noted that the proposal put forward by the representative of Canada was similar in thrust to the proposal submitted by the delegation of France. If the Commission agreed with the principle behind the proposals, it must decide whether to include the provision in article 17 or to make it the subject of a separate provision.

92. **Mr. Markus** (Observer for Switzerland) supported the proposal by Canada. Article 17 was not the only article that would affect consumer protection. Accordingly, the issue should be covered by a separate provision.

93. **Mr. Meena** (India) said that if the Commission believed that the Convention should not override original contracts in violation of the law of the location of the consumer, then clearly the modification was warranted.

94. **Mr. Chan** (Singapore) said that if the text of article 17 were to refer to consumers, then the Convention must also define the term "consumer". The proposal by Canada simplified matters, as it did not use that term. His delegation thus supported that proposal. Economy of language could be achieved by incorporating the formulation in article 4, paragraph 1 (a).

95. **Mr. Joko Smart** (Sierra Leone) said that article 17, which dealt with principles of debtor protection, was not the appropriate place for a provision on consumer protection.

96. **Ms. Brelier** (France) said that her delegation could support the proposal made by the delegation of Canada.

97. **The Chairman** said that, on the understanding that the matter of consumer protection would be addressed in article 4, he would take it that the Commission wished to approve article 17.

98. *On that understanding, draft article 17 was approved.*

99. **The Chairman** said that the Commission had thus concluded its consideration of the Convention.

100. **Mr. Burman** (United States of America) paid tribute to the skill of the Chairman in guiding the Commission's deliberations to a successful conclusion.

The meeting rose at 5.05 p.m.